



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

MEH:ddj

Docket No: 380-00

27 June 2000

[REDACTED]

This is in reference to your application for correction of your deceased former spouse's naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

[REDACTED]

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 27 June 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your former spouse's naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by BUPERS memorandum of 5 June 2000, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

5 Jun 00

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: Assistant for BCNR Matters (PERS-OOZCB)

Subj: COMMENTS AND RECOMMENDATION ICO EMG [REDACTED]

Ref: (a) BCNR memo of 30 Mar 00

1. Per reference (a), recommend BCNR not correct [REDACTED] record to reflect that he changed his election under the Survivor Benefit Plan (SBP) from spouse to former spouse, with an effective date of 23 March 1992, the day following his divorce.

2. The recommendation is based on the following:

a. [REDACTED] transferred to the Fleet Reserve on 22 September 1975. He elected spouse coverage on that date. He died on 17 November 1995.

b. [REDACTED] and [REDACTED] were married 27 July 1963. They were divorced on 22 March 1992.

c. Public Law 99-145, enacted 8 November 1985, amended Title 10, U.S. Code, Section 1447-1455 to permit coverage for former spouses under the spouse category.

d. Title 10, U.S. Code, Section 1448 (b) (3), requires that SBP participants with spouse coverage who become divorced and desire to maintain their former spouses as their beneficiaries specifically elect such coverage within one year after the date of divorce.

e. Title 10, U.S. Code, Section 1450(f) (3), permits former spouses to have court-ordered SBP elections deemed on a member's behalf if that member does not voluntarily change their election during the one-year timeframe. To do so, a former spouse must submit a written request to the Defense Finance and Accounting Service-Cleveland (DFAS-CL) within one year of the date of the court order. In other words, a former spouse must submit the request before the deadline by which the member may make the change voluntarily.

Subj: COMMENTS AND RECOMMENDATION ICO [REDACTED]
[REDACTED]

3. The evidence presented by [REDACTED] is insufficient to change [REDACTED]'s record to show [REDACTED] as his SBP beneficiary. [REDACTED] did not specifically notify DFAS-CL, within one-year of his divorce, of any voluntary desire to designate [REDACTED] as his former spouse SBP beneficiary. The divorce decree and separation agreement show no clear intent by the parties for Ms. [REDACTED] to receive former spouse SBP coverage. SBP spouse coverage is not specific to an individual and no law required [REDACTED] to maintain [REDACTED] as his SBP beneficiary upon termination of their marriage. Finally, if [REDACTED] believes her divorce is invalid, she will need to petition the appropriate Virginia State court and request that the divorce decree be set aside.

[REDACTED]
Head, Navy Retired Activities
Branch (PERS-622)

5420
PO612/145-1
MAY 26 2000

From: [REDACTED], Pers-0612
To: [REDACTED] Pers-622d

Subj: BCNR PETITION - [REDACTED]

Encl: (1) BCNR File with cover memo dtd 30 Mar 00
(2) Ms. [REDACTED] ltr dtd 14 May 2000 w/out attachments

1. This responds to your request for a legal opinion on the BCNR petition of [REDACTED]. [REDACTED] is the former spouse of EMC (ret.) [REDACTED]. She requests DD Form 1883, Survivor Benefit Plan (SBP) Election Form, be amended to enable her to receive SBP. Recommend denial of her petition due to insufficient evidence.

Issue

2. Is [REDACTED] the SBP beneficiary of EMC [REDACTED]

SHORT ANSWER

3. No. [REDACTED] separation agreement and divorce decree did not require [REDACTED] to elect former spouse SBP coverage for Ms. [REDACTED]. The evidence also does not support Ms. [REDACTED] 2 alternate theories of SBP entitlement that: (1) the law under which [REDACTED] participated in SBP precluded him from changing SBP beneficiaries; or (2) that she was still married to [REDACTED] at the time of his death because their divorce was not legal under Virginia law.

BACKGROUND

4. [REDACTED] and [REDACTED] were married 27 July 1963 in Elizabeth City, North Carolina. [REDACTED] transferred to the Fleet Reserve (retired) on 22 September 1975. Prior to his transfer to the Fleet Reserve, [REDACTED] completed DD Form 1883, SBP Election Certificate, on 6 August 1975. [REDACTED] elected reduced annuity coverage for spouse and children based on \$300.00 retired pay. [REDACTED] and Ms. [REDACTED] were divorced 25 March 1992 in Norfolk, Virginia. At the time of their divorce, their daughter was no longer a minor. [REDACTED] remarried on 28 August 1993. [REDACTED] died on 17 November 1995.

Subj: BCNR PETITION - [REDACTED]

5. Neither the divorce decree nor the separation agreement require [REDACTED] to continue SBP coverage for [REDACTED] past their marriage.

a. Page 3, paragraph 4, of the divorce decree states [REDACTED] is entitled to receive 32.5% of [REDACTED] net retirement pay from the U.S. Navy, including cost of living and other adjustments, "beginning February 1, 1992, and continuing until the death of either party".

b. Paragraph 14a of the separation agreement reads: "The Husband shall pay to the Wife, as and for her share of his United States Navy retirement, a sum equal to 32.5% of each net monthly retirement payment, beginning February 1, 1992, and "continuing until the death of either party (and notwithstanding the remarriage of the wife).

6. SBP is mentioned in one version of the divorce decree and the separation agreement only for purposes of defining net military retirement pay.

a. Two versions of the divorce decree on file with the Circuit Court in Norfolk, Virginia were provided for review. They are alike in every way with 2 exceptions. In one version the handwritten entry "SBP" is inserted between "taxes" and "and" on page 4 and the judge's signature is found on page 6. In the other version, page 4 does not contain the handwritten entry and the judge's name is stamped rather than signed on page 6. The phrase in which "SBP" is inserted reads as follows: "net retirement pay shall be defined as the amount remaining after deductions of Federal and State taxes, SBP and Social Security".

b. Paragraph 14d of the separation agreement states: "For the purpose of this provision, net shall be defined as the amount remaining after deduction of Federal and State taxes, and Social Security, if any." The handwritten entry, "and SBP for wife DB BB" is inserted after "Social Security". "DB" and "BB" appear to be the initials of [REDACTED] and [REDACTED].

c. The handwritten changes in the divorce decree and separation agreement did not obligate [REDACTED] elect to have SBP apply to his ex-wife after their divorce or award [REDACTED] SBP.

Subj: BCNR PETITION - EMC DONALD ARTHUR BEST, 279-28-4454

7. In a 14 May 2000 letter (enclosure (2)), [REDACTED] writes:

"He participated in the Survivor's Benefit Plan for many years and was under the 'old grandfather law' which stated 'he could not change the SBP beneficiary' since I was married to him for at least ten years of his active credible service plus 2 years of reserve time. He filed for legal separation when I was 53 years old. I have not remarried. Therefore, his benefits are mine."

[REDACTED] does not cite the law she references as "the old grandfather law."

8. In the same letter [REDACTED] writes:

Numerous lawyers told me that you have to wait six months from the date of filing or one year from filing when property, bonds, etc. are involved. The judge never signed the divorce decree. My question is [sic] how did he get a divorce so quickly and remarry in such a short period of time under these laws? Three different divorce decrees have appeared in the file at the court. There have been discrepancies in each set; therefore, I doubted whether I was legally divorced especially since the judge had not signed the decree."

Discussion

9. The divorce decree and separation agreement did not award Ms. [REDACTED] former spouse SBP coverage. The divorce decree and separation agreement expressly state [REDACTED] was entitled to 32.5% of [REDACTED] net military retirement pay "until the death of either party." Ms. [REDACTED] right to military retirement payments ended upon [REDACTED] death.

10. SBP coverage for spouse is not specific for an individual. Coverage does not continue for a spouse who subsequently becomes a former spouse unless the election is changed to former spouse.

a. If the member elects spouse or spouse and child coverage at the date of eligibility and subsequently becomes divorced, the member has one year from the date of divorce to change the election to former spouse coverage.

Subj: BCNR PETITION - EMC [REDACTED]

b. The former spouse can deem the election if it was in the divorce decree but must do so within 1 year of the divorce decree.¹ The former spouse or the former spouse's attorney does so by written request upon which the Secretary of the Navy or his representative can act. Such request is acceptable if it refers to, or cites provisions in a court order concerning SBP former spouse coverage, or makes clear by other references to SBP that there is intent that SBP coverage be provided to the former spouse. A copy of the court order or statement should accompany the written request from the clerk of court. The court order, regular on its face, must require an SBP election or, incorporate, ratify, or approve the written agreement of the member. If an election is deemed in a case involving a statement from the clerk of court, the statement from the clerk of court or other appropriate official must indicate that the agreement has been filed with the court under applicable state law.²

11. The handwritten entries in the divorce decree and separation agreement reference SBP only for purposes of defining net military retirement pay. Nowhere in the divorce decree or separation agreement is it stated that Ms. [REDACTED] is awarded SBP as a former spouse. Even if the divorce decree and separation agreement awarded SBP to [REDACTED], the law requires the change to former spouse coverage be made within 1 year from the date of divorce.

12. In paragraph 3 of the separation agreement, [REDACTED] waives all other claims against EMC [REDACTED], "except for those given to her in the agreement." Paragraph 22 states that the separation agreement is the full settlement of the parties. In her petition Ms. [REDACTED] has not presented any evidence that suggests otherwise.

13. In the alternative, [REDACTED] asserts that the law under which [REDACTED] participated in SBP precluded him from changing SBP beneficiaries. The fact is [REDACTED] never made any changes to his initial election; however, SBP coverage for spouse is not specific for the individual. Upon their divorce being final, Ms. [REDACTED] was no longer [REDACTED] SBP beneficiary because she was no longer his spouse.

¹ 10 U.S.C. § 1450(f)(3) (1998).

² Volume 7A DOD Financial Management Regulation (Sep 1999) section 430403.

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14. Generally, an SBP election is irrevocable but there are several exceptions.³ For example, a member with spouse or spouse and child coverage may within 1 year of date of decree of divorce change the annuity to provide an annuity to a former spouse or to a former spouse and child. Also, a member who is participating with spouse or spouse and child coverage and who does not have an eligible spouse beneficiary may, upon remarriage: resume coverage, increase the level of coverage up to and including full retired pay, or elect not to have full spouse coverage resumed.

15. [REDACTED] contends she was not divorced from [REDACTED] because they failed to comply with Virginia state law. She offers no evidence in support of this contention other than her own statement in her 14 May 2000 letter of which the relevant contents are contained in paragraph 8 of this memorandum.

a. Page 2 of the divorce decree states that [REDACTED] was granted a divorce from [REDACTED] "pursuant to Section 20-91-(9)(a) of the Code of Virginia, 1950 as amended, on the grounds that the parties have lived separate and apart without any cohabitation and without any interruption for more than twelve (12) months." One of the documents [REDACTED] has provided is her answer and amended cross bill to [REDACTED] petition for divorce. In paragraph 2 of this document [REDACTED] admits that she and [REDACTED] lived separate and apart for a period exceeding 12 months.

b. With respect to marriage and divorce, state law controls. The Navy lacks the authority to determine whether a divorce decree issued by a state is valid. If Ms. Best wishes to challenge the validity of her divorce decree, she will need to petition the appropriate Virginia state court. Should Ms. Best prevail, she is free to again petition BCNR with respect to this matter.

Conclusion

16. The evidence is insufficient to change EMC [REDACTED] records to show Ms. [REDACTED] as his SBP beneficiary. The divorce decree and separation agreement evince no clear intent by the parties for Ms. [REDACTED] to receive former spouse SBP coverage. SBP spouse coverage is not specific to an individual and no law required

³ Id. section 4307.

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EMC [REDACTED] to maintain [REDACTED] as his SBP beneficiary upon termination of their marriage. Finally, if [REDACTED] believes her divorce is invalid, she will need to petition the appropriate Virginia state court and request that the divorce decree be set aside.

[REDACTED]
Assistant Legal Counsel